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Nos. 06-5618 and 06-5754

In the Supreme Court of the United States

MARIO CLAIBORNE, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

VICTOR A. RITA, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Families Against Mandatory Minimums (FAMM) is a national nonprofit, nonpartisan organization. FAMM's primary mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. By mobilizing thousands of individuals and families whose lives have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform.

FAMM promotes sentencing policies that give judges discretion to distinguish among defendants and to sentence them according to their role in the offense, the seriousness of the offense, the potential for rehabilitation, and the characteristics of the offender. In short, FAMM believes that the punishment always must fit the crime. FAMM's vision is a nation in which sentencing is individualized, humane, and *sufficient but not greater than necessary* to impose just punishment, secure public safety, and support the successful rehabilitation and reentry of offenders.

FAMM believes that this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), represented a significant and positive step toward those goals. FAMM is concerned, however, that the federal courts of appeals have too often failed to heed the lessons of *Booker* and in general

[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation and submission of this brief.

have, subtly but effectively, reinstated the inflexible Guidelines regime that this Court has rejected.

SUMMARY OF ARGUMENT

I. The core congressional command in 18 U.S.C. § 3553(a) is that district courts must "impose a sentence sufficient, but not greater than necessary, to comply" with specified purposes of punishment. The statutory language is an elegant distillation of one of the most long-established and influential maxims in criminology: the principle of parsimony. That principle, which provides that punishment should *never* exceed the minimum necessary to effect its purposes, has deep roots in American soil. It was well known to the founding generation through the work of the Italian criminologist Cesare Beccaria, who borrowed the concept from Montesquieu, as well as the English philosopher Jeremy Bentham. The maxim was given new currency in the twentieth century and was one of the foundational ideals for a number of reform-minded criminal law scholars whose efforts culminated in the Sentencing Reform Act of 1984 (SRA).

The principle of parsimony has now reasserted itself in light of *Booker*. By excising a conflicting command in 18 U.S.C. § 3553(b)(1) that district courts must hew to the Sentencing Guidelines, the remedial majority in *Booker* left the principle of parsimony as the sole binding substantive feature of the statutory sentencing scheme. Federal courts must follow that congressional command at every step of the sentencing process just as seriously as they were required to follow the Guidelines before *Booker*.

II. Section 3553(a) also contains a second mandatory feature: the procedural requirement that district courts "shall consider" a variety of expressly enumerated factors in fashioning sentences. In requiring courts to formulate every sentence by considering a defined set of philosophical principles and a range of specified sentencing-related factors, § 3553(a) reflects the overriding importance of two indispensable elements of just sentencing: reasoned judgment and individual-

ized tailoring. Section 3553(a) directs district judges to think carefully about the general purposes of punishment; the history and characteristics of the offender; the nature of the offense; and the views of the Sentencing Commission. District judges must then exercise reasoned discretion to tailor a sentence for the particular person who stands before the court. Section 3553(a), in short, creates a regime in which mechanical calculation is not to be elevated over individualized consideration, and in which bureaucratized punishment is not to supplant human judgment.

Given the principle of parsimony and § 3553(a)'s requirement that district courts individually consider a range of specified sentencing factors, the statute provides no basis for a presumption in favor of a guideline sentence (or, similarly, a requirement that an out-of-guideline sentence be justified by "extraordinary circumstances"). Nothing in the statute's text or structure provides any foundation for concluding that a sentence calculated under § 3553(a)(4), which was preeminent only because of the now-excised portion of § 3553(b)(1), is entitled to special significance for purposes of appellate review. By creating Guidelines-focused presumptions, several circuits have acted at odds with the basic reasoning of the remedial majority opinion in *Booker*, and have impermissibly substituted a differential standard of appellate review for the across-the-board reasonableness standard announced in that opinion.

III. The task of giving content to *Booker*'s "reasonableness" standard for appellate review must be dictated by what the statutory text and structure actually require. The purpose of such review is modest, but significant: to ensure that district courts do not stray unreasonably from their core statutory obligation to impose individualized sentences consistent with the bedrock imperative of parsimony, which take into account the factors specified in § 3553(a). Whether a sentence falls within a guideline range, above it, or below it, the same criteria should be applied in determining whether a sentence is reasonable. Several additional points about the nature of

post-*Booker* appellate review follow from these basic observations.

A. The plain terms of § 3553(a) show that process matters. Meaningful appellate review of sentences imposed under that provision is possible only to the extent that the district court provides a record demonstrating that it has considered all that the statute requires. The more thorough and well-documented the district court's consideration of the statutory factors, the greater the likelihood that the resulting sentence should be upheld as reasonable. This does not mean that a sentence imposed pursuant to correct procedures invariably must be upheld. But it is to say that the primary task of appellate courts should be to ensure that the procedural requirements of § 3553(a) have been satisfied.

B. Once an appellate court is satisfied that a procedurally correct sentence has been imposed, further review of the sentence for reasonableness should be guided by two principles. First, to ensure that a court of appeals retains an ability to remedy a true outlier sentence, while ensuring that the appellate court does not substitute its judgment for the decision of the judge who actually looked the defendant in the eye, the appellate court should be permitted to review the substantive sentencing result only under an *extremely* restrictive standard. Second, because a district court's primary task is to comply with the parsimony requirement in § 3553(a), the reviewing court should always ask itself whether the district judge imposed the least restrictive sanction necessary to achieve the specified purposes of sentencing. If the court of appeals is *not* convinced that the district judge reasonably concluded that he or she imposed the least severe punishment that still would have satisfied the specified purposes of sentencing, then the sentence must be vacated.

If the Court articulates the scope of reasonableness review in such a way, FAMM believes that the federal sentencing process will move closer to embodying the attributes of a fair and humane system of justice: respect for the law as written, individualized consideration of individual circum-

stances, and the treatment of all people, including criminal defendants, as ends rather than as means.

ARGUMENT

I. Congress Has Directed that the Principle of Parsimony, Which Has Roots in Our Nation's Founding, Must Be the Touchstone of Federal Sentencing Decisions

In 18 U.S.C. § 3553(a), Congress required that district courts "impose a sentence sufficient, but not greater than necessary, to comply" with specified purposes of punishment. That imperative—the principle of parsimony—is best understood by reference to its historical roots.

A. "All punishment which is not derived from necessity," wrote Montesquieu in 1748, "is tyrannical." Baron Charles de Montesquieu, The Spirit of the Laws, Bk. XIX.14 (G. Bell & Sons, Ltd. 1914). This simple but profound idea was to have immense influence on criminal law reformers from the eighteenth century to the twentieth. Indeed, Spirit of Laws "was one of the first works to treat the problem of criminal law critically and extensively, and, as such, is considered to be of great importance to the 18th century movement for criminal law reform." Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 811 (1975).

Writing in 1764, the great Italian criminologist Cesare Beccaria openly acknowledged his debt to Montesquieu in formulating his own philosophy of punishment:

> Every punishment which does not arise from absolute necessity, says the great Montesquieu, is tyrannical. A proposition which may be made more general thus. Every act of authority of one man over another, for which there is not an absolute necessity, is tyrannical. It is upon this then, that the sovereign's

> right to punish crimes is founded; that is, upon the necessity of defending the public liberty, entrusted to his care, from the usurpation of individuals; and punishments are just in proportion, as the liberty, preserved by the sovereign, is sacred and valuable.

Cesare M. Beccaria, An Essay On Crimes and Punishments 20 (Adolph Caso ed. 1984) ("Caso"). Beccaria's basic insight, which he derived from Rousseau's theory of the social contract, was that each individual, in forming political society, "would choose to put into the public stock the smallest portion possible" of his liberty, "as much only as was sufficient to engage others to defend it." *Id.* at 21. For that reason, punishment must be strictly limited to the minimum necessary to preserve public peace and security, for "all that extends beyond this, is abuse, not justice." *Id.* Beccaria thus argued that all punishments that "exceed the necessity of preserving" the bonds holding individuals together in society "are in their nature unjust." *Id.*

Influenced by Beccaria, the English philosopher Jeremy Bentham advocated a very similar doctrine, although he justified it in more overtly utilitarian terms. "The last object is, whatever mischief is guarded against, to guard against it at as cheap a rate as possible: therefore *The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given.*" Jeremy Bentham, An Introduction to the Principles and Morals of Legislation, ch. XIV, para.13 (1781). Parsimony, according to Bentham, derives from a straightforward cost-benefit calculus: among equally effective means to achieve a given end, those that are less costly or burdensome should be preferred. The fact that this same principle of punishment could be grounded in both the social-contract and the utilitarian traditions undoubtedly helps account for its widespread acceptance and importance in the years to come.

And, indeed, these thinkers and their ideas had an immense influence on the founding generation in America. "In

every colony, the ideas and writings of such social critics and reformers as Voltaire, Rousseau, Montesquieu, and Beccaria were known and often quoted." Schwartz & Wishingrad, *supra*, 24 BUFF. L. REV. at 813; see also *Ullmann* v. *United States*, 350 U.S. 422, 450 (1956) (Douglas, J., dissenting) (observing that "Beccaria and his French and Englisn followers influenced American thought in the critical years following our Revolution."). An American edition of Beccaria's treatise possibly appeared as early as 1773, and certainly no later than 1776. See Caso 7 (Editor's Introduction). In the years between the signing of the Declaration of Independence and the ratification of the Constitution, "the book appeared in translation in practically every cultural center of Europe and America." *Id.* During this period, American lawyers and political leaders were making serious efforts at legal reform, attempting to bring American law into greater harmony with the principles of justice and liberty that animated the Revolution more generally. See Schwartz & Wishingrad, *supra*, 24 BUFF. L. REV. at 814-16. In particular, "a general perception existed that a need existed to ameliorate the criminal penalties." Erwin C. Surrency, *The Transition from Colonialism to Independence*, 46 AM. J. LEGAL HIST., 55, 79 (2004). The European theorists who advocated for parsimony in the meting out of criminal punishments provided much of the intellectual horsepower for these reform efforts. *Id.* at 78-79.

Thomas Jefferson, in particular, was deeply influenced by Beccaria. See Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic*, 47 AM. J. LEGAL HIST. 35, 89 (2005). Jefferson's work in the 1770s as part of the Virginia Committee of Revisors for the reform of the State's legal system drew on Beccaria's insistence on strict proportionality between punishment and crime. The annotations to Jefferson's 1778 "Bill for Proportioning Crimes and Punishments" contain multiple references to Beccaria's treatise, and in a later letter, Jefferson noted that "'Beccaria, and other writers on crimes and punishments, had satisfied the reasonable world of the unrightfulness and inefficacy of [punishing] crimes by death.'" Schwartz &

Wishingrad, *supra*, 24 BUFF. L. REV. at 818. John Adams was intellectually indebted to Beccaria as well. Adams owned a copy of the 1775 London edition of *On Crimes and Punishments*, and he thought highly enough of Beccaria's work both to give the book as a gift to his son in 1800, see Caso at 9, and to quote Beccaria during his famous defense of the British soldiers accused of murder during the Boston Massacre, see Schwartz & Wishingrad, *supra*, 24 BUFF. L. REV. at 813-14.

B. As the text of § 3553(a) indicates, the Enlightenment-era insights of Montesquieu, Beccaria, and Bentham that punishment must be not greater than necessary to advance a particular objective are not some moribund historical curiosity. Through the work of scholars whose efforts at criminal law reform echoed that of the founding generation, the principle of parsimony was given new currency in the twentieth century. Foremost among these reformers was Norval Morris of The University of Chicago Law School. Morris identified parsimony as one of the basic norms that must guide any legitimate sentencing process. See generally Michael Tonry, *Preface*, 32 CRIME & JUSTICE vii, viii (2004) (describing Morris as "a criminal-justice institution builder of unmatched influence, and his ideas about punishment have transformed the ways people think"). In Morris's influential formulation, the parsimony principle stated that "[t]he least restrictive or least punitive sanction necessary to achieve a defined social purpose should be chosen." Norval Morris, *The Future of Imprisonment: Toward A Punitive Philosophy*, 72 MICH. L. REV. 1161, 1162 (1974); see also Tonry, *supra*, 32 CRIME & JUSTICE at ix (explaining that "a principle of parsimony requires imposition of the least severe applicable punishment unless good, empirically grounded reasons exist for doing more"). Like Beccaria, Morris argued that parsimony is not merely a utilitarian virtue, but also a moral imperative. Morris thus wrote that a "system of criminal justice that is not infused with parsimony in punishment * * * creates an intolerable engine of tyranny." Norval Morris, Madness and the Criminal Law 155 (1982).

Although Morris was uniquely influential, he himself observed that he was hardly alone in advocating parsimony as the touchstone of criminal sentencing. He noted that a presumption in favor of less severe punishments "pervades all recent scholarship and most legislative reforms. Justification for this utilitarian and humanitarian principle follows from the belief that any punitive suffering beyond social need is, presumably, what defines cruelty." Morris, *supra*, 72 MICH. L. REV. at 1163. Thus, in endorsing the parsimony principle, Morris was "on well-trodden ground"; the "American Law Institute's Model Penal Code, the American Bar Association's Project on Minimum Standards for Criminal Justice, and two recent national crime commissions have advocated parsimonious use of imprisonment." Andrew Rutherford, *A Review of Norval Morris' The Future of Imprisonment*, 66 J. CRIM. & CRIMINOLOGY 380, 383 (1975).

The widespread acceptance of the parsimony principle in our own time should come as no surprise. Indeed, it seems almost intuitive to say that punishment not limited by a principle of parsimony is both immoral and wasteful; such punishment is "merely gratuitous, serving no legitimate purpose." Sharon Dolovich, *Legitimate Punishment in a Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 401 (2004). In pursuing the goal of parsimony, therefore, it must always be remembered that "punishment requires moral justification" and that "more punishment than necessary to the purpose of retribution is not justifiable." Mary Ellen Gale, *Retribution, Punishment, and Death*, 18 U.C. DAVIS L. REV. 973, 1015 n.123 (1985). Moreover, this emphasis on the need to justify a particular quantum of punishment against a set of defined goals illustrates that the parsimony principle includes both a substantive and a procedural dimension. Substantively, it "limits punishments to the least restrictive sanction possible," while procedurally, it "requires the state to prove why the offender deserves a particular punishment." *Id.* at 1015.

C. Just as parsimony is not an eighteenth century relic, neither does it find a home only in the academic library or

lecture hall. To the contrary, it is now a congressional command. When Congress enacted the Sentencing Reform Act of 1984 (SRA), it distilled the philosophical idea of parsimony into the statutory requirement that district courts "*shall impose a sentence sufficient, but not greater than necessary*, to comply with the purposes set forth in paragraph (2) of this subsection." 18 U.S.C. § 3553(a) (emphasis added). Implicitly acknowledging Morris's understanding that parsimony requires a set of defined social purposes for punishment, paragraph (2) seeks to capture the four generally accepted justifications of criminal punishment. These are: retribution (subparagraph (A)); deterrence (subparagraph (B)); incapacitation (subparagraph (C)); and rehabilitation (subparagraph (D)). Congress's decision to include a parsimony requirement in the SRA was hardly radical. In fact, given the central role that the parsimony principle occupied in sentencing reform circles in the years leading up to the enactment of the SRA (which was nothing less than an implementation of the Founders' values), it arguably would have been more remarkable had the new law *not* accounted for the concept of parsimony.

As originally enacted, however, the command to impose sentences based on the principle of parsimony stood in direct tension with a rival statutory obligation. At the same time that § 3553(a) instructed judges to impose a parsimonious sentence, § 3553(b)(1) instructed them that "the court shall impose a sentence of the kind, and within the range," provided by the applicable provision of the Sentencing Guidelines. *Booker*, 543 U.S. at 259 (Breyer, J.). In *Booker*, this Court noted the patent conflict between § 3553(a) and § 3553(b)(1): "While subsection (a) of § 3553 of the sentencing statute lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, subsection (b) directs that the court 'shall impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited cases." 543 U.S. at 233-34 (Stevens, J.).

The tension created by these competing sentencing directives was a product of the SRA's convoluted legislative history and the realities of political compromise. The Senate was the primary force behind the federal sentencing reform effort, and most of the provisions of the final bill originated in that body. This was true of § 3553(b)(1). See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 271 & n. 296 (1993). The parsimony directive, however, originated in the House of Representatives. A bill sponsored by Representative Conyers and reported out of the House Judiciary Committee in June 1984—a bill that was more in line with a system of advisory guidelines—included a provision directing judges "to impose the sentence (whether or not a departure from advisory guidelines) that *would be the 'least severe' sufficient to serve the purposes of sentencing*." *Id.* at 262 (quoting H.R. 6012, 98th Cong., 2d Sess. (1984) (emphasis added)). In October 1984, "Senator Mathias succeeded in obtaining an amendment to add a new first sentence to the directives to the sentencing court along the lines suggested by Representative Conyers." *Id.* at 271. It was this amendment (co-sponsored by Senator Thurmond) that added the "sufficient, but not greater than necessary" language eventually codified in § 3553(a). See *id.* at 271-72; 130 CONG. REC. 29,870 (1984).

Under the House bill, the obligation to impose a sentence consistent with the principle of parsimony—rather than the Guidelines—would have been the primary command given to the district courts. Thus, where the Guidelines suggested a sentence that the court deemed more severe than necessary, the Guidelines would have had to give way. See Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 272. When the parsimony directive was added to the Senate bill, however, it was forced to vie for influence with what became § 3553(b)(1)'s command to abide by the Guidelines. Because Congress never addressed, much less resolved, the tension, *id.*, the courts and the Sentencing Commission were left to work it out.

But, instead of confronting the statutory contradiction as a problem to be solved through ordinary principles of construction, the courts "essentially ignored not only the parsimony language, but the entire set of congressional directives to judges in 3553(a)." Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 746 (1999). Indeed, the parsimony provision became "almost hortatory in practice when placed against the mandate that erects a presumption in favor of the guideline sentence." Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 272. The obligation to impose a Guidelines-compliant sentence thus ultimately trumped the requirement of parsimony. That triumph of § 3553(b)(1) was ensured primarily by two factors: this Court's repeated admonitions that the Guidelines were to be followed, see, *e.g.*, *Stinson* v. *United States*, 508 U.S. 36, 42 (1993); *Williams* v. *United States*, 503 U.S. 193, 198 (1992), and the ever-present threat of appellate reversal for judges who strayed from what the Guidelines required, see 18 U.S.C. § 3742(e)(3)(B)(ii); *Mistretta* v. *United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).[2]

All of that changed, however, with the decision in *Booker*. The remedial majority opinion resolved the conflict between the parsimony directive and the Guidelines sentencing command by invalidating the two provisions of the SRA that had kept the parsimony directive from playing its proper role in the federal sentencing process for the previous two decades. *Booker*, 543 U.S. at 259 (Breyer, J.) (holding that § 3553(b)(1) and § 3742(e) had to be severed and excised). The result of this statutory surgery is that the parsimony di-

[2] The hegemony of § 3553(b) was not an inevitable (or necessarily correct) outcome. See, *e.g.*, *United States* v. *Davern*, 937 F.2d 1041, 1042 (6th Cir. 1991) (en banc) (Merritt, J., dissenting); *United States* v. *Denardi*, 892 F.2d 269, 276 (3d Cir. 1989) (Becker, J., concurring in part and dissenting in part) (arguing that the parsimony directive was binding and had to be followed every bit as much as § 3553(b)).

rective in § 3553(a) now stands as the sole substantive mandate that binds district judges when they impose sentences. *Id.* at 261. Federal courts therefore must take the congressional command of parsimony seriously at every step of the sentencing process. In this sense, the SRA now resembles something akin to the original House bill described above. As in that bill, the Guidelines now exist *only* as advisory provisions that a sentencing court must consider, but before which it need not bow. *Booker*, 543 U.S. at 246, 264. The parsimony directive has now prevailed, and the obligation to impose a sentence "sufficient, but not greater than necessary" to achieve the specified purposes of sentencing is now preeminent. When that obligation clashes even slightly with the sentence suggested by the now-advisory Guidelines, it is the Guidelines that must give way.

II. Presumptions In Favor of the Guidelines, and Standards of Review that Accord Special Weight to the Guidelines, Are Inconsistent with the Commands of Congress Set Forth in 18 U.S.C. § 3553(a)

A. In the wake of *Booker*, federal sentencing policy remains a statutorily defined system. Now, however, *every* sentencing factor enumerated in § 3553(a), not merely § 3553(a)(4), must be respected. Any analysis of what reasonableness review should entail, therefore, must begin with a careful look at what the text of § 3553(a) requires, and what it does not.

Section 3553(a) includes both a substantive command and a procedural one. The substantive command is, of course, the requirement of parsimony: the district court must impose a sentence that is no more severe than necessary to achieve the purposes of punishment set forth in § 3553(a)(2). To discharge this obligation, a sentencing court must take into account each different purpose of sentencing and determine how each of them would (or would not) be advanced by reducing (or increasing) a quantum of punishment. The procedural command, which compels the sentencing court to "consider" each enumerated factor (necessarily before com-

plying with the substantive directive), reinforces the overarching substantive obligation to impose a parsimonious sentence. See Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 82-83 (2005) (factors are to be considered "subject to the overall requirement of parsimony"). Each directive is mandatory: the sentencing court *must* consider each of the sentencing factors that Congress has prescribed, and then, with that set of considerations in mind, *must* act parsimoniously.

The seven specific factors that § 3553(a) instructs district courts to consider are:

- "the nature and circumstances of the offense and the history and characteristics of the defendant";
- the four general purposes of punishment;
- the "kinds of sentences available";
- the applicable guideline range;
- "any pertinent policy statement" of the United States Sentencing Commission;
- the need to avoid "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"; and
- the "need to provide restitution" to victims.

18 U.S.C. § 3553(a)(1)-(7). The requirement that the court "consider" each of these elements reflects the importance of two basic—and we think indispensable—components of just sentencing: individualized tailoring and reasoned judgment. The kind of consideration mandated by § 3553(a) ensures *both* that the ultimate sentence is appropriate to the particular facts and circumstances of the individual defendant *and* that it is the product of a clear and established set of principles and standards.

The consideration process begins with a careful evaluation of the specific individual who stands before the court.

See 18 U.S.C. § 3553(a)(1).[3] The judge must ask who that person is and how he or she came to commit the crime. The court must also ask how serious the offense was, how likely the defendant is to commit other crimes, and whether there is a reasonable possibility that particular sentencing options will help that defendant rehabilitate or become a more productive member of society. Once those issues have been considered, the court must then ponder the sentencing range under the relevant Guidelines provisions, as well as any formal statements put forward by the Sentencing Commission. As with all of the § 3553(a) factors, however, the court's obligation is only to "consider" the work of the Commission; there is no longer any applicable statutory requirement of deference or obedience either to the guideline range or to any policy statement.

The mandatory consideration process also facilitates reasoned decision-making. By examining each of the § 3553(a) criteria, judges are compelled to reflect on general principles of punishment and the myriad elements that make up a criminal sentence. The procedural directive contained in § 3553(a) is designed to "encourage sentencing judges to exercise their own judgment regarding the purposes of sentencing and the factors relevant to sentencing." Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 271. Performed as intended, therefore, the consideration process does not entail the checking of items on a list; instead, it is an occasion for the sentencing judge to make a reasoned moral choice about how to punish a person most appropriately in light of all the facts and circumstances of his or her case. One important consequence of this process is that it requires every sentencing court to take full moral and legal responsibility for the sentence imposed. No longer can a judge deflect responsibility

[3] We do not suggest that the statute must be construed to require a district court to consider the enumerated factors in the order stated. For example, a judge might find it prudent first to consider what limits may exist on the range of lawful choices, as required by § 3553(a)(3).

onto the bureaucracy of the Sentencing Commission or take refuge behind a numerical grid. Such direct accountability requires the exercise of "deliberation and moral judgment," Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1256 (1997)—something that is a profoundly important part of the traditional craft of judging, but that has been lost in the era of mandatory Guidelines.

Sentencing based exclusively on the Guidelines represented the triumph of "bureaucratic penalization," in which individualized consideration and reasoned judgment were jettisoned in favor of uniform administrative regulations and routine arithmetic. *Id.* at 1254; see also Ellsworth A. Van Graafeiland, *Some Thoughts on the Sentencing Reform Act of 1984*, 31 VILL. L. REV. 1291, 1293-94 (1986) (stating that the sentencing process under the Guidelines could almost be "performed by a computer or an accountant"). That is no longer so. Whereas mandatory Guidelines sentencing pursuant to § 3553(b)(1) and § 3553(a)(4) tended to transform defendants into "kinds of persons, abstract entities to be defined by a chart," the sentencing procedure called for by § 3553(a) allows judges, indeed commands them, to "consider the circumstances of the crime and of the defendant in their entirety and to form a judgment on that basis." Stith & Cabranes, *supra*, 91 NW. U. L. REV. at 1263. In this regime, human judgment has supplanted mechanical calculation as the primary feature of the federal sentencing process.

At the same time, the statutory scheme in the post-*Booker* context avoids what were often seen as the critical deficiencies of the federal sentencing process before enactment of the SRA—its "failure to provide for review of the decisions of sentencing judges and its failure to ensure that the sentencing judge's exercise of discretion was informed by authoritative criteria and principles." *Id.* at 1254. To the contrary, § 3553(a) provides specific criteria for the sentencing court to consider. Those criteria include provisions aimed at ensuring that individualization does not result in the kinds of unjust

and unwarranted sentencing disparities that can be seen to mock the rule of law. See *Booker*, 543 U.S. at 264-65 (Breyer, J.) (observing that the system remaining after *Booker*, "while not the system Congress enacted," nonetheless works "to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary"). And, of course, as discussed in greater detail below, an integral part of the remedial majority opinion in *Booker* was its recognition that an appropriate role exists for appellate review in the sentencing process. *Id.* at 260-64. These features ensure that the sentencing process is one distinguished by appropriately *bounded* discretion. See *Martin* v. *Franklin Capital Corp.*, 126 S. Ct. 704, 710 (2005) ("limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike"). It allows for individualized consideration without the risk of surrendering to arbitrariness or anarchy.

B. Applied as written, § 3553(a) calls for a sentencing process that preserves many of the virtues of the regime that existed before *Booker* while reining in (and potentially eliminating) many of its vices. It is unfortunate, therefore, that many courts of appeals—including the courts below in the present cases—have misinterpreted that provision by holding that there should be a presumption in favor of the reasonableness of a within-guideline sentence (or, similarly, by manufacturing a requirement that a substantial variance from the Guidelines can be justified only by "extraordinary circumstances"). Such contrivances are not supported by the post-*Booker* statutory scheme or by *Booker* itself. They are constitutionally problematic because they re-inject into the sentencing process the types of features that led the Court to hold in *Booker* that an enhanced guideline sentence based on facts not authorized by a jury verdict violates the Sixth Amendment. And from a practical perspective, they are simply not necessary to ensure the salutary goal of ensuring individualized sentencing while minimizing unwarranted sentencing disparities.

As an initial matter, the statutory text does not support either a rule that presumes the reasonableness of a guideline sentence or a standard that deems a variance from the guideline range reasonable only in extraordinary circumstances. Nothing in § 3553(a) even *hints* at giving an across-the-board preference for one of the factors it enumerates, be it the Guidelines or otherwise, over the rest. Indeed, the various opinions in *Booker* explicitly recognized that the statute affords no special weight to the Guidelines, but instead treats them merely as one element to be considered among a variety of others. See *Booker*, 543 U.S. at 259-60 (Breyer, J.) (§ 3553(a) "requires judges to take account of the Guidelines *together with other sentencing goals*") (emphasis added); *id.* at 300 (Stevens, J., dissenting in part) (the guideline range "is now nothing more than a suggestion that may or may not be persuasive to a judge when weighed against the numerous other considerations listed in 18 U.S.C. § 3553(a)"). Thus, as Justice Scalia observed, "under § 3553(a), [district judges] will need only to 'consider' that range as one of many factors," and the "*statute provides no order of priority among all those factors.*" *Id.* at 304-05 (Scalia, J., dissenting in part) (emphasis added).

Reading a pro-Guidelines presumption into the SRA is also decidedly at odds with the structure of the statute as it exists in its post-*Booker* form. The original Senate bill, introduced in 1977, called for a largely advisory guidelines system; "it directed the sentencing judge to consider a variety of factors, only one of which was the sentencing range established by the Guidelines, and subjected the ultimately chosen sentence to appellate review under a 'clearly unreasonable' standard." *Id.* at 293 n.12 (Stevens, J., dissenting in part). Subsequently, however, the Senate amended the bill to include a directive to the sentencing court to impose a guideline sentence unless there was an aggravating or mitigating circumstance not adequately taken into account by the Sentencing Commission. Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 245. That provision, which of course became § 3553(b)(1), was added to the bill precisely in order to "set a

clear *presumption* favoring the Guideline sentence, requiring sentencing judges to sentence within the guideline range except in the rare case." *Id.* at 271 (emphasis added). As Senator Kennedy explained on the Senate floor, this provision was intended to "'make clearer the basic *presumptive* aspects of the guidelines.'" *Id.* at 245 (emphasis added) (quoting 124 CONG. REC. 383 (1978)). Now that *Booker* has excised § 3553(b)(1), the pro-Guidelines presumption embodied in that provision has necessarily evaporated.

Given the remedial holding in *Booker*, a presumption in favor of the reasonableness of a Guideline sentence could be justifiable only insofar as such a sentence is in fact likely in all cases to satisfy the requirements of § 3553(a). Cf. *Leary* v. *United States*, 395 U.S. 6, 36 (1969) (a presumption is "irrational" and "arbitrary" unless "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend"). But that premise cannot be proven. Indeed, it is utterly fanciful to assume that a guideline range is intended to correspond, or generally even will, with § 3553(a)'s overarching obligation of parsimony and its enumerated sentencing factors.

In the first place, Congress's decision to include the Guidelines as just one of seven enumerated factors is powerful evidence that the legislature never expected that consideration of the Guideline range alone would be sufficient either to discharge the procedural requirements of § 3553(a) or to achieve the kind of substantive sentencing result that the "sufficient, but not greater than necessary" language demands. Nor does the legislative history of the SRA give any hint that Congress viewed Guideline sentencing as the equivalent of parsimonious sentencing. Indeed, as discussed above, that history—including the tension between § 3553(b)(1) and § 3553(a) that was not resolved until *Booker* was decided—suggests quite the opposite.

For its part, the Sentencing Commission *could* have shaped the Guidelines with the parsimony directive in mind, but it has not done so. For example, notwithstanding § 3553(a)(1)'s unlimited reference to "the history and characteristics of the defendant," the Commission has significantly circumscribed a district judge's ability to consider, under § 3553(a)(4), a defendant's history and characteristics. The Commission has thus determined that certain factors are *never* relevant (a disadvantaged upbringing (§ 5H1.12); drug or alcohol dependence (§ 5H1.4); and economic hardship (§ 5K2.12)) and that other factors are relevant *only* in extraordinary circumstances (age (§ 5H1.1); education and vocational skills (§ 5H1.2); mental and emotional conditions (§ 5H1.3); physical condition (§ 5H1.4); employment record (§ 5H1.5); family ties and responsibilities (§ 5H1.6); and record of prior good works (§ 5H1.11)). See also *Koon* v. *United States*, 518 U.S. 81, 95-96 (1996) (describing factors as "forbidden," "discouraged," and "encouraged"). In practice, therefore, the aim of a Guidelines sentence was not to impose a sanction "that would best achieve any of the purposes of sentencing," or one that was sufficient but not greater than necessary to meet those objectives; instead, the purpose was "nothing more and nothing less than compliance with the Sentencing Guidelines." Stith & Cabranes, *supra*, 91 NW. U. L. REV. at 1264.

C. Devices such as those created by the courts below also raise constitutional problems because they tend to fuse back together the two elements (judicial fact-finding and binding guidelines) that *Booker* decisively separated. See *Booker*, 543 U.S. at 233 (Stevens, J.). In other words, the decisions below limit judicial discretion without affording any role for the jury. That is simply not consistent with *Booker*. Although one or more Members of this Court might ultimately have preferred to leave in place a sentencing regime in which judges could continue to apply guidelines that would carry extra weight, the remedial majority plainly em-

phasized that "that is not a choice that remains open." *Id.* at 265 (Breyer, J.).

As *Booker* makes clear, a truly advisory guideline system is distinguished by the sentencing court's freedom to impose a sentence outside of the suggested guideline range. Thus, the departure authority in the Guidelines was insufficient to let them pass constitutional muster because "departures are not available in every case, and in fact are unavailable in most." *Id.* at 234 (Stevens, J.). That is also why the remedial majority excised § 3742(e), which required appellate courts to evaluate whether the sentence departed from the Guideline range based on a factor "not authorized under section 3553(b)," 18 U.S.C. § 3742(e)(3)(B)(ii). That provision used the appellate review function to constrain the ability of district courts to sentence outside of the guideline range and thus brought the Guidelines into conflict with the Sixth Amendment.

Against this backdrop, the "extraordinary circumstances" requirement adopted by the Eighth Circuit makes the Guidelines virtually indistinguishable from the unconstitutional sentencing regime struck down in *Blakely* v. *Washington*, 542 U.S. 296 (2004). Under that regime, as the Court explained in *Booker*, "the Washington statute allowed the judge to impose a sentence outside the sentencing range for 'substantial and compelling reasons.'" 543 U.S. at 234 (Stevens, J.). Because not every case presents substantial and compelling reasons for departing, the guideline range would in some instances be mandatory and thus incompatible with the Sixth Amendment. *Blakely*, 542 U.S. at 304. There simply is no valid constitutional distinction between a rule forbidding significant departures except in "extraordinary circumstances" and a rule forbidding departures except for "substantial and compelling reasons." Indeed, as in *Blakely*, the holding below that "the sixty percent reduction granted to Claiborne was an extraordinary variance that is not supported by comparably extraordinary circumstances," Claiborne Pet. App. 3,

had the effect of making the non-Guideline sentence legally impermissible. As a result of the Eighth Circuit's newfangled rule, there is now a non-trivial set of cases in which an out-of-guideline sentence will be unavailable as a matter of law. That flies in the face of both *Blakely* and *Booker*.

III. "Reasonableness" Review Should Focus on Whether the District Court Has Considered Its Obligations Thoroughly, Articulated Its Reasons Fully, and Infused Every Aspect of Its Sentencing Determination with the Principle of Parsimony

The statute's text and structure should be the lodestar for defining and applying the "reasonableness" standard of review. After *Booker*, the obligation of a district judge is to impose an individualized sentence that "consider[s]" the various factors set forth in § 3553(a), giving those factors the weight the judge thinks appropriate in the circumstances, each one subject to the overarching requirement of parsimony. The purpose of appellate review in this scheme is simply, but importantly, to ensure that district courts do not stray unreasonably from those statutory requirements. Several important points about the nature of post-*Booker* reasonableness review follow from this basic understanding.

A. Whether a sentence is imposed within a guideline range, above the range, or below it, reasonableness review should involve the same criteria. Indeed, one of *Booker*'s central messages is that a sentence may no longer be insulated from meaningful appellate review merely because it falls within a particular numerical range. That was the situation before *Booker*, as a result of 18 U.S.C. § 3742.[4] Subsection (e) of that provision created a system of differential appellate review depending on whether a sentence was inside or

[4] It was also the situation before the enactment of the SRA, when any sentence within the *statutory* range was effectively unreviewable for severity. See *Koon* v. *United States*, 518 U.S. 81, 96 (1996). Procedural violations, of course, were subject to review on appeal.

outside the applicable guideline range. Sentences outside the range were subject to de novo review and could be invalidated if the court of appeals deemed the departure legally impermissible or "unreasonable." 18 U.S.C. § 3742(e)(3), (f). In contrast, sentences within the range could be invalidated only if they were imposed "in violation of law" (for example, if the district court erred in calculating the applicable range). 18 U.S.C. § 3742(e)(1). Under that regime, therefore, a sentence within a properly calculated Guideline range was effectively unreviewable, in the absence of procedural error or a misapprehension of the scope of discretion. See, *e.g.*, *United States* v. *Woodrum*, 959 F.2d 100, 101 (8th Cir. 1992) (per curiam); *United States* v. *Garcia*, 919 F.2d 1478, 1482 (10th Cir. 1990).

But no longer. In invalidating and excising § 3742(e), the remedial majority in *Booker* replaced that two-tiered approach to appellate review with a single "reasonableness" standard, one that, the Court explained, was to be applied "across the board." 543 U.S. at 263 (Breyer, J.). Thus, *Booker* collapsed the difference between sentences within and outside the applicable guideline range for the purpose of appellate review. The effect of this statutory surgery was to impose for *all* sentences a standard of appellate review that has, as an analogue, the reasonableness standard used to evaluate *out-of-guideline* sentences before the enactment of the PROTECT Act in 2003. See *id.* at 261.[5] A presumption of reasonableness has no place in this new regime, because its purpose and effect are to subject a within-guideline sentences to less searching scrutiny than a sentence that falls

[5] The PROTECT Act amended the SRA to provide, among other things, that an out-of-guideline sentence, even if not unreasonable by its own terms, could be reversed merely because the district court departed based on a factor "not authorized under section 3553(b)." Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. 108-21 § 401(d)(1), 117 Stat. 670.

outside of the guideline range. That is inconsistent with the unitary standard of review that *Booker* requires.

B. Procedural correctness, supported by a proper statement of reasons, should be powerful evidence that a sentence is reasonable. Under § 3553(a), proper sentencing decisions entail the consideration of multiple elements. The mandate that a district court "shall consider" those elements is integral to ensuring that courts do not abuse the considerable discretion they have to fashion criminal sentences. The mandate, in other words, helps to ensure that sentences are the product of reasoned judgment, rather than mere whim. See *supra* II.A. And the importance of *using* reason is reinforced by the requirement of *giving* reasons. That is why the SRA requires a district court to "state in open court the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553(c).

Along with encouraging reasoned judgment, the procedural mandates in § 3553(a) and § 3553(c) improve the sentencing process by facilitating appellate review. After all, meaningful review of the reasonableness of a sentence imposed pursuant to a directive to consider a number of statutory factors is possible only to the extent that the district court actually provides some objective indication that it has indeed considered the statutory requirements. Cf. *United States* v. *Taylor*, 487 U.S. 326, 343 (1988) (observing that "thorough appellate review" of decisions made under the Speedy Trial Act requires that a district court "carefully express its decision . . . in terms of the guidelines specified by Congress"). If the district court's consideration process is extensive, is well-documented, and reflects precisely how the various § 3553(a) factors were considered in the context of the particular defendant's case, the appellate court should be most reluctant to condemn the resulting sentence as unreasonable.

On the other hand, an appellate court will have more justification in viewing as unreasonable a sentence that is not supported by well-stated reasons. Thus, if a district court imposes a sentence without a substantial and thorough expla-

nation of how it examined the sentencing factors specified in § 3553(a)—*e.g.*, a terse on-the-record statement, no written discussion—a reviewing court rightfully will have little confidence that the ultimate sentence is the kind of parsimonious and well-considered punishment required by the statute. Accordingly, "any sentencing decision that fails to thoroughly and thoughtfully address the congressional directives of section 3553(a) must be considered suspect." Douglas A. Berman, *Reasoning Through Reasonableness*, 115 YALE L.J. POCKET PART 142, 143 (2006). This is not to say that a procedurally correct sentence should *invariably* be upheld. See II.C. *infra*. But it *is* to say that the fundamental task of an appellate court engaged in reasonableness review should be to ensure that the procedural requirements of § 3553(a) have been satisfied. The extent to which a district court imposes a procedurally correct sentence should, except in the rarest case, strongly correlate with whether the sentence is reasonable.

This approach to reasonableness review is further supported by "[d]ifferences in the institutional competence of trial judges and appellate judges." *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 (2001). After all, it is a not particularly difficult for appellate courts to determine whether district judges have stated with sufficient clarity and thoroughness the factors that went into their decisions and the reasons that led them to impose the sentence that they ultimately selected. Such matters may readily be reviewed on a paper record. Indeed, "under these circumstances, the appellate court will be in as good a position to consider the question as the district court was in the first instance." *Koon*, 518 U.S. at 98.

In contrast, it is far more taxing (and fraught with risk) for appellate courts to engage in a searching review of a district judge's subjective, discretionary act of selecting an individual sentence. As this Court has recognized:

> "Face to face with living witnesses the original trier of the facts holds a position of advan-

> tage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth * * * * How can we say the judge is wrong? We never saw the witnesses * * * * To the sophistication and sagacity of the trial judge the law confides the duty of appraisal."

Marshall v. *Lonberger*, 459 U.S. 422, 434 (1983) (quoting *Boyd* v. *Boyd*, 169 N.E. 632, 634 (N.Y. 1930)). Cf. *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 325 (1967) (noting that because trial courts have "firsthand knowledge of witnesses, testimony, and issues," they have a greater "'feel' for the overall case"). The institutional advantage of the district courts explains why, before the SRA was enacted, district courts were afforded broad discretion to impose sentences, and appellate review of substantive sentencing outcomes was virtually unavailable. See, *e.g.*, *Dorszynski* v. *United States*, 418 U.S. 424, 431-32 (1974). Indeed, this Court has held that "except to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" *Williams*, 503 U.S. at 205 (quoting *Solem* v. *Helm*, 463 U.S. 277, 290 n.16 (1983)).

Booker does nothing to disturb that basic principle. To the contrary, the "reasonableness" standard it adopted was in explicit contrast to the searching kind of appellate review of discretionary sentencing decisions that had been mandated in the PROTECT Act provision (18 U.S.C. § 3742(e)) invalidated by the remedial majority. See *Booker*, 543 U.S. at 260-61. That excision (subject to the other changes wrought by *Booker*) effectively returned the law to where it was when this Court said in *Williams* that, although the SRA "established a limited appellate review of sentencing decisions, it did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion." *Williams*, 503 U.S. at 205. As this Court stated in *Koon*, "deference

[is] owed" to the district court because it is clearly the "'judicial actor * * * better positioned * * * to decide the issue in question.'" *Koon*, 518 U.S. at 99 (quoting *Pierce* v. *Underwood*, 487 U.S. 552, 559-60 (1988)).

C. Although reasonableness review should be defined largely by its insistence on procedural correctness, it is not without a substantive component. In some cases, the record may reflect that a sentencing result, although procedurally proper, is nonetheless arbitrary and capricious and manifestly irrational. Any time that a reviewing court questions the outcome, however, it runs the risk of substituting its judgment for the decision of the judicial officer who is in an institutionally superior position to determine the appropriate sentence. To minimize that risk, and to avoid the possibility that the courts of appeals will again devise standards (as the courts below did in the present case) that improperly limit the discretion of district courts, this Court should make clear that a sentence imposed in a procedurally correct manner is subject to reversal only if the reviewing court concludes that the sentence is arbitrary and capricious and manifestly irrational, or if, as we discuss next, the sentence runs afoul of the principle of parsimony.

D. Given the overarching parsimony command of § 3553(a), an appellate court engaged in substantive reasonableness review should ask itself the same fundamental question that Montesquieu, Beccaria, Bentham, and Norval Morris contemplated: Was the district court reasonable in concluding, or did it fail to ascertain, that the judgment of sentence represents the *least severe* punishment necessary to achieve the specified purposes of the criminal law? That is because "a district court's job is not to impose a 'reasonable' sentence. Rather, a district court's mandate is to impose 'a sentence sufficient, but not greater than necessary, to comply with" the purposes of sentencing specified in § 3553(a)(2). *United States* v. *Foreman*, 436 F.3d 638, 644 n.1 (6th Cir. 2006). Just as the procedural mandate that a district court "shall consider" the prescribed sentencing factors must in-

form the appellate review process, so too must the normative mandate that the district court impose a parsimonious sentence. Accordingly, if the appellate court is *not* convinced that the district judge reasonably concluded that he or she imposed the least burdensome punishment that would have satisfied the specified purposes of punishment, the unparsimonious sentence should be vacated. In this way, appellate review plays an important role in ensuring that punishment is never imposed wastefully or gratuitously.

* * *

If the Court animates the concept of reasonableness review with the principles that we have discussed, FAMM believes that the federal sentencing process not only will comply with the law as written, but will also come closer to being a truly just and humane system of punishment. Respecting the statutory command of parsimony will foster and embody the importance of respecting the law as written. Requiring courts to consider carefully the various purposes of punishment and to explain their sentences openly and rationally ensures that individual circumstances will receive individualized consideration and that sentences will be based on the exercise of reason rather than caprice. And, finally, remembering that punishment requires moral justification, and that it imposes significant costs on individuals that must always be justified, ensures that all people—including criminal defendants—are treated as ends rather than as means.

CONCLUSION

The judgments of the courts of appeals in both 06-5618 and 06-5754 should be reversed.

Respectfully submitted.

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